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IN THE

Supreme Court of the United States

APRIL TERM, 1966

No. 1274

BEAUFORT CONCRETE COMPANY, PETITIONER,

versus

ATLANTIC STATES CONSTRUCTION COMPANY,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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versus

ATLANTIC STATES CONSTRUCTION COMPANY,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Beaufort Concrete Company, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on October 5, 1965, for which a petition for a re-hearing was denied on February 1, 1966.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit (*infra,* Appendix A, Page 1) is reported at 252 F. (2d) 460.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 5, 1965 (*infra,* Appendix A, Page 11). Rehearing was denied on February 1, 1966 (*infra,* Appendix A, Page 17). The jurisdiction of the Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals for the Fifth Circuit sanction a departure from the accepted and usual course of judicial proceedings on the part of the United States District Court for the Southern District of Georgia by affirming the District Court's holding that plaintiff's counter-affidavits submitted in opposition to the defendant's motion for Summary Judgment were inadmissible when the District Court did not announce to counsel at the time of the hearing its ruling on the admissibility of plaintiff's counter-affidavits and in fact directed that they be handed to the Clerk as offer of proof and permitted argument based upon the affidavits, thereby leading plaintiff's counsel to believe that they were being considered and causing plaintiff's counsel to offer no further excuse, nor to request a continuance nor to offer further testimony which was available?

2. Did the Circuit Court of Appeals for the Fifth Circuit sanction a departure from the accepted and usual course of judicial proceedings on the part of the United States District Court for the Southern District of Georgia by affirming the District Court's granting of Summary Judgment to the defendant when the Court was apprised

that there was relevant evidence which the plaintiff would tender on trial of cause which would make a genuine issue of fact; and when defendant's affidavits, even considered alone, showed genuine issues of fact existed?

3. Did the Circuit Court of Appeals for the Fifth Circuit err in sustaining the District Court's finding that the decision of the engineer was final and binding based upon the decision of the Georgia Court of Appeals in *State Highway Dept. v. McDougald Construction Company*, 1939, 189 Ga. 490, 6 S. E. (2d) 570, and thereby erroneously misapply and extend the finality of the engineer's decision as between owner and contractor to the authority to place blame for defect as between the contractor and a materialman?

STATUTES INVOLVED

Rule 56 (e) of Federal Rules of Civil Procedure.
Rule 56 (f) of Federal Rules of Civil Procedure.
Rule 6 (d) of Federal Rules of Civil Procedure.

STATEMENT

In September, 1960, the defendant, Atlantic States Construction Company, a Georgia Corporation, entered into a general contract with the Georgia Ports Committee for the construction of docks and warehouses at The Garden City Terminal near Savannah, Georgia. On June 13, 1961, Atlantic States issued to the plaintiff, Beaufort Concrete Company, a purchase order for certain ready-mixed concrete required for the performance of the contract between Atlantic States and the Georgia Ports Committee. Pursuant to this contract, the plaintiff furnished to the defendant ready-mixed concrete and other materials which it alleges have a value of Two Hundred Ninety-one Thousand Eight Hundred Thirteen and 07/100 ($291,813.07) Dollars and has been paid by the defendant only the sum of Two

Hundred Four Thousand Two Hundred Ninety-nine and 98/100 ($204,299.98) Dollars, leaving due and owing the sum of Eighty-seven Thousand Five Hundred Thirteen and 09/100 ($87,513.09) Dollars.

This action to recover the balance due the plaintiff, Beaufort Concrete Company, was commenced in the Court of Common Pleas for Beaufort County, South Carolina, in April, 1962. It was removed by the defendants to the United States District Court for the Eastern District of South Carolina because of diversity of citizenship of the parties. Upon motion of the defendant, the action was then transferred to the United States District Court for the Southern District of Georgia, Savannah Division, for the convenience of parties and witnesses and in the interest of justice under Section 1404 (a) Title 28 U. S. C. A.

The defendant by its Answer denies that it owes the plaintiff anything, alleging that certain of the ready-mixed concrete furnished by the plaintiff failed to meet the requirements of the plans and specifications of the prime contract, was rejected by the engineer-architect and that this decision of the engineer-architect is final and binding on all the parties.

The defendant by its motion of October 19, 1963, moved for a Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure on the grounds that there was no genuine issue as to any material fact. Prior to the hearing the plaintiff presented to the defendant and to the Court its affidavits in reply to defendant's motion of Summary Judgment (R. 95-126). The defendant moved that these not be considered on the grounds that they were not served prior to the date of hearing under Rule 56 (c) of the Rules of Civil Procedure. Judge F. M. Scarlett did not rule on this motion and during the argument on the motion for Summary Judgment allowed the plaintiff to refer to and

quote from its affidavits which were before the Court. It was not until the receipt of the printed record that the plaintiff knew of the notation made by the Court on the original affidavits (R. 126). By his Order of February 7, 1964, Judge F. M. Scarlett granted the defendant motion for Summary Judgment. From this Order the plaintiff appealed to the United States Court of Appeals for the Fifth Circuit which by its decision dated October 5, 1965, affirmed the judgment of the District Court and by the Order dated February 1, 1966, denied the plaintiff's petition for a rehearing. It is this decision that the petitioner now seeks to have this Court review.

REASONS FOR GRANTING THIS WRIT

It was the duty of the District Judge to rule upon the admissibility of the plaintiff's counter-affidavits when they were presented at the hearing on the defendant's motion for Summary Judgment. Had he announced his refusal to admit the affidavits, plaintiff's counsel could have asked for an enlargement of time and made a showing that the failure to act was the result of excusable neglect under Rule 6 (b); or could have requested a continuance or extension of time under Rule 56 (f) or could have submitted oral testimony of a witness present at the hearing under Rule 56 (e). The District Court by ordering the counter-affidavits handed up to the Clerk of Court and by allowing counsel for both parties to argue fully on the contents of the affidavits lulled counsel for plaintiff into believing that the Court had permitted the serving of the counter-affidavits on the date of the hearing as it had a right to do under Rule 6 (d) of the Federal Rules of Civil Procedure and that the counter-affidavits were being fully considered.

The Court in its written order dated February 7, 1964, gave no indication of its ruling on the admissibility of the

plaintiff's counter-affidavits and it was not until the printed record in the appeal to the Circuit Court of Appeals for the Fifth Circuit was obtained that plaintiff knew that the Court had endorsed upon the back of the original counter-affidavits filed with the Clerk, the notation that the affidavits were not secured till the case was determined by the Court at the conclusion of argument, which notation was erroneous.

It was the duty of the presiding judge at the hearing on the motion for Summary Judgment to make a clear ruling on the admissibility of the plaintiff's counter-affidavits and his failure to do this was prejudicial to the plaintiff and caused the plaintiff to fail to make additional motions or offer additional evidence. By its proceedings, the District Court has denied the plaintiff his right to have the issues of fact tried and determined by a jury.

Summary Judgment is a drastic remedy and should be temperately and cautiously used. *Carantyas v. Iowa Mutual Insurance Co.*, C. A. 5th 1956, 235 F. (2d) 193. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test out, in advance of trial by inquiring and determining whether such evidence exists. *Whitaker v. Coleman*, C. C. A. 5th 1940, 115 F. (2d) 305. Technicalities have no place in the Summary Judgment procedure. Where Court is apprised that there is relevant evidence which will be tendered on trial before jury which would raise issue of fact then Summary Judgment should not be granted. *Whitaker v. Coleman, supra.* In the instant case the Court knew and had before it the plaintiff's counter affidavits which clearly raised questions of fact.

The defendants own affidavit (Record Pages 59 and 89) shows that in the defendant's opinion the engineer's interpretation and application of the specifications was

wrong and, therefore, raise questions of fact for determination by a jury.

The case of *State Highway Department v. McDougald Construction Company,* 1939, 189 Ga. 490, 6 S. E. (2d) 570 and the other cases cited thereunder by the District Court all deal with the engineer's decision on work wholly performed by the contractor where there is a dispute between the contractor and the owner. In the present case the dispute is between the materialman and the contractor and the rejection of the completed work does not make it *prima facie* the materialman's fault. The defendant contractor was responsible for the handling, placement, finishing and curing of the ready mixed concrete (Pages 86 and 87 of Record). There is evidence that the contractor added water to the concrete. All of these factors, controlled by and the responsibility of the contractor, affect the emplaced strength of the concrete. The engineer's decision as to the concrete poured on July 1st and July 5th was based solely on an analysis of cores or samples taken from the completed structure (Page 53 of Record). No defect was found in the material supplied by the plaintiff on those days, but only after it was emplaced for which the defendant had the greater responsibility.

The general rule that the engineer's decision is binding upon the parties is not applicable in this case since that decision was only that the owner refused to accept certain completed work from the defendant-contractor and did not touch upon whether this was the responsibility of the contractor or the material supplier. This is a question which should be determined upon a full trial of the case.

The defendants own affidavit (Record Pages 59 and 89) shows that in the defendant's opinion the engineer's interpretation and application of the specifications was

wrong and, therefore, raise questions of fact for determination by a jury.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Beaufort, S. C.,
April 26, 1966.

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21701

BEAUFORT CONCRETE COMPANY, APPELLANT,

versus

ATLANTIC STATES CONSTRUCTION COMPANY, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA.

(October 5, 1965.)

Before TUTTLE, Chief Judge, and PHILLIPS,* and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The plaintiff, Beaufort Concrete Company, appeals from an order granting summary judgment in favor of the defendant, Atlantic States Refining Company. The issues are (1) whether the district court abused its discretion in refusing to consider Beaufort's affidavits, submitted on the day of the hearing, opposing the motion for summary judgment and (2) whether the case presents a "genuine issue as to any material fact"

* Senior Judge of the Tenth Circuit sitting by designation.

within the meaning of Rule 56(c) of the Federal Rules of Civil Procedure. Affirming, we hold that the district court did not abuse its discretion in excluding the affidavits, and that, without the disputed affidavits, the case was a proper one for summary judgment.

September 1960, Atlantic States, a Georgia corporation, entered into a general contract with the Georgia Ports Committee for the construction of docks and warehouses at the Garden City Terminal near Savannah, Georgia. Beaufort, a South Carolina corporation, was Atlantic State's subcontractor for the supply of ready-mixed concrete. June 13, 1961, Atlantic States issued to Beaufort a purchase order for certain concrete required for the performance of the contract between Atlantic States and the Georgia Ports Committee. Beaufort's complaint alleges that Beaufort supplied concrete, meeting the contract specifications, worth $291,813.07, contract price, but was paid only $204,-299.98. In this suit Beaufort seeks to recover the balance of $87,513.09.[1]

In its answer Atlantic States asserts that six of the concrete "pours", so-called—those of June 23 and of July 1, 5, 7, 12, and 14—were found to be substandard by the project engineer, and had to be removed and replaced. The purchase order required that Beaufort's materials comply with the plans and specifications of the general contract between Atlantic States and the Georgia Ports Committee. That contract provided that the "decisions of the Engineer shall, within the terms of the Contract Documents, be final". Appended to Atlantic State's answer are letters from Robert Company and Associates, the architect-engineer employed by the Georgia Ports Committee, condemning the six allegedly defective slabs, and assigning as reasons for the deficiencies inadequate cement content and improper batching and mixing by Beaufort.

The answer also asserts, and the district court found, that Atlantic States, after being advised by Robert Com-

[1] April 20, 1962, Beaufort brought this suit in the Court of Common Pleas for Beaufort County, South Carolina. Atlantic States removed the action to the United States District Court for the Eastern District of South Carolina. It was then transferred to the Southern District of Georgia.

pany and Associates that the defective concrete would have to be removed and replaced made an agreement with Beaufort whereby Atlantic States was to make a good faith effort on behalf of Beaufort to persuade the project engineers to accept the defective concrete. In return, the answer alleges, Beaufort agreed (1) that it would abide by the ultimate decision of the architects and engineers, and (2) that if it became necessary to remove and replace the concrete, all costs, including those for tests and attorneys' fees, would be for Beaufort's account. October 30, 1961, relying on this agreement, Atlantic States wrote a letter to Robert Company and Associates asserting that four of the six allegedly defective pours were in fact within the specifications of the general contract, and that all six pours were adequate for the purpose for which they were intended. Atlantic States offered to make further tests and to furnish a ten-year structural bond guaranteeing the sufficiency of the condemned slabs.

Atlantic States's effort to persuade the engineers failed. December 5, 1961, Atlantic States wrote Beaufort that it had exhausted all feasible means of changing the engineers' decision, and was proceeding to remove and replace the condemned slabs, all costs to be charged to Beaufort's account. By a letter dated December 7, 1961, Henry C. Chambers, the president of Beaufort, acknowledged Atlantic States's letter of December 5, and remarked that his "only request regarding the demolition is that you can be completely honest and fair with us as to the charges and cost".

Because of the alleged agreement with Beaufort and Atlantic States's reliance on that agreement, Atlantic States urges that Beaufort is estopped to challenge the engineers' final decision, or to deny liability for the reasonable costs of removing and replacing the defective concrete. Items of offset and counterclaim urged by Atlantic States include $13,200, the price of the defective concrete; $95,621.04, the cost of removing and replacing the condemned slabs; and $100,000 for damage to Atlantic States's business reputation.

October 17, 1963, Atlantic States moved for summary judgment. In support of its motion Atlantic States submitted affidavits of Charles H. Girardeau III, vice-president of Atlantic States, and of Harry C. Robert, Jr. of Robert Company and Associates. The hearing was set for February 7, 1964. That day, just before the hearing was to begin, Beaufort's lawyer tried to serve counter-affidavits on Atlantic States's lawyer, who refused to accept service.[2] The court ordered the affidavits incorporated into the record, but later held them inadmissible because not timely filed under Rule 56 of the Federal Rules of Civil Procedure. February 10, 1964, the court granted the defendant's motion for summary judgment.

I

Rule 56(c) of the Federal Rules of Civil Procedure, dealing with summary judgment, provides that "the adverse party *prior to the day of hearing* may serve opposing affidavits". (Emphasis added.) Professor Moore comments that this provision of Rule 56(c) "should be read in conjunction with Rule 6(d) which invests in the court the power to permit opposing affidavits 'to be served at some other time.'" 6 Moore, Federal Practice 2098. Rule 6(d), the general canon on time limitations under the Federal Rules, requires opposing affidavits to be served "not later than one day before the hearing, unless the court permits them to be served at some later time". Because the "unless"

[2] The plaintiff's affidavits were the following: (1) an affidavit dated October 16, 1961, by Peter Doe, a driver of one of Beaufort's mixing trucks, alleging that "on many occasions" the supervisor employed by Atlantic States instructed the driver to add between five and ten gallons of water to batches that had already been mixed; (2) an affidavit by Henry C. Chambers, president of Beaufort, dated January 20, 1964, asserting that the tests of the condemned concrete were improperly conducted and interpreted, and that the attempt by Atlantic States to persuade the engineers to change their decision was not induced by any agreement that Beaufort would abide by the ultimate decision of the engineer or bear all costs of testing; and (3) an affidavit by Delmar L. Bloem, an expert in the field of ready-mixed concrete, dated February 3, 1964, expressing Bloem's opinion (a) that the condemned slabs were not substandard, (b) that the testing procedures were improper, (c) that Beaufort could not be held solely responsible for the strength of of the concrete, since the handling, placement, and curing of the concrete, all of which affect its strength, were performed by Atlantic States, and (d) that water added to the ready-mixed concrete "would greatly affect the implaced strength of the concrete".

clause is missing from Rule 56, it could be argued that the time limitation set out there permits no exception. But this reading does not comport with the liberal tenor of the Federal Rules, and is not justified by any singularity of the motion for summary judgment. "Rule 6(b) is a rule of general application giving wide discretion to the court". Advisory Committee's Note to Amendment to Rule 6. See generally Barron and Holtzoff (Wright's Ed.) §§ 215, 216.

Rule 6(b), relating to enlargement of time for doing any act "required or allowed to be done at or within a specified time", provides that

> the court *for cause shown* may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done *where the excusable neglect* . . . (Emphasis added.)

We conclude that it was within the district court's discretion, at least on proper showing, to admit the plaintiff's affidavits.

To exclude the affidavits, however, was no abuse of discretion. One of the affidavits is dated October 16, 1961, more than three years before the hearing; the other two are dated January 20 and February 3, 1964. So far as the record and briefs show, the plaintiff has offered no excuse, either in the district court or here, for its delinquency. In these circumstances, we cannot say that the district court exceeded its power in holding the plaintiff to the letter of the rule.

II

Without the excluded affidavits, little is left to the plaintiff's case—nothing, in fact, but the bare allegation in the complaint that Beaufort furnished adequate concrete for which it was not fully paid. This allegation will not withstand the force of the affidavits and letters submitted by the defendant, in support of its answer and motion for summary judgment, asserting that the concrete was substandard because improperly mixed and batched. Moreover,

Beaufort does not deny that the project engineers condemned the disputed concrete. Under Georgia law, the decision of a duly designated arbitrator is conclusive, absent dishonesty or gross mistake. *State Highway Dept. v. McDougald Construction Co.*, 1939, 189 Ga. 490, 6 S. E. 2d 570; *Royal Indemnity Co. v. Batson-Cook Co.*, 1928, 37 Ga. App. 797, 142 S. E. 210; *Green & Co. v. Jackson & Co.*, 1880, 66 Ga. 250; *Grant, Alexander & Co. v. Savannah, Griffin & North Alabama Railroad Co.*, 1874, 51 Ga. 348. The sentences added to Rule 56(e) in 1963 control the decision.

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk

Edward W. Wadsworth
Clerk

Room 408—400 Royal St.
New Orleans, La. 70130

February 1. 1966

Re: No. 21701—Beaufort Concrete Co.
-vs- Atlantic States Const. Co.

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk.

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Office-Supreme Court, U.S.
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IN THE

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April Term, 1966

No. 1274

BEAUFORT CONCRETE COMPANY, *Petitioner*

versus

ATLANTIC STATES CONSTRUCTION COMPANY,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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IN THE

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April Term, 1966

No. 1274

BEAUFORT CONCRETE COMPANY, *Petitioner*

versus

ATLANTIC STATES CONSTRUCTION COMPANY,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

The respondent does not agree that the questions presented by the petitioner on pages 3 and 4 of its Petition are properly stated, or that such questions are properly raised by the prior proceedings in this action and the decisions of the United States District Court for the Southern District of Georgia and the United States Court of Appeals for the Fifth Circuit challenged by the petitioner. The respondent submits that the questions in fact presented for review by this Court, if any, are as follows:

1. Where the petitioner failed to follow the applicable Rule and attempted to serve counter-affidavits to the respondent's motion for summary judgment on the day of the hearing thereon a few moments before the hearing was to

begin, and, upon the respondent's refusal to accept service of the counter-affidavits and objection to the admission and consideration thereof by the Court, said counter-affidavits were submitted to the Court by petitioner under the Court's direction as an offer of proof, can the Court's action in following the Rule and excluding the counter-affidavits be said to have been a departure from the accepted and usual course of judicial proceedings, when the petitioner offered no excuse for its failure to follow the applicable Rule and made no effort at any time to avail itself of any remedy under the Rules?

2. Was the District Court required as a matter of law to refrain from granting summary judgment for the respondent on the basis of the pleadings and the respondent's supporting affidavits properly before it, merely because the opposing party had unsuccessfully attempted to serve counter-affidavits that were out of time under the Rules, so that the Circuit Court's affirmance of the District Court's judgment must be said to constitute sanctioning a departure from the accepted course of judicial proceedings?

3. Did the Circuit Court of Appeals for the Fifth Circuit err in sustaining the finding of the District Court that under the contract documents involved and the applicable State law the decision of the project engineer was binding and that the respondent was entitled to summary judgment?

STATUTES AND RULES INVOLVED

In addition to the Rules set forth in the Petition of the petitioner herein, the following Rule is applicable herein:

Rule 56 (c) of the Federal Rules of Civil Procedure.

STATEMENT

In order to conform to the designation of the parties by the petitioner in its Petition herein, and in order to avoid confusion, the petitioner and respondent will be referred to in the Statement and Argument hereinafter as "plaintiff" and "defendant", respectively.

In September, 1960, the defendant entered into a written contract with the Georgia Ports Committee whereby the defendant, as general contractor, agreed to construct certain facilities for the Georgia Ports Committee at the Garden City Terminal, near Savannah, Georgia. Thereafter, on or about June 13, 1961, the defendant issued its purchase order (in effect a subcontract) to the plaintiff whereby the plaintiff agreed to furnish to the defendant, under the conditions stated in the purchase order, certain concrete required for the Garden City Terminal project. The purchase order provided that the concrete was to be furnished in accordance with "all provisions of the plans and specifications, including general conditions", of the general contract.

The purchase order further provided that "the Architect's decision as to the true construction and meaning of the drawings and specifications shall be final." In like fashion, the general conditions of the general contract provided, *inter alia*, that "the Engineer shall make decisions on all claims of the contractor and on all other matters relating to the execution and progress of the work or the interpretation of the Contract Documents", and that "the decision of the Engineer shall, within the terms of the Contract Documents, be final".

The architect-engineer employed by the Georgia Ports Committee was Robert and Company Associates, Architects and Engineers, of Atlanta, Georgia.

All concrete supplied by the plaintiff for the project was tested by an independent testing laboratory in accordance with the provisions of the general contract and the procedure established thereunder by the architect-engineer (hereinafter referred to simply as the engineer). Samples (referred to as "control cylinders" or "test cylinders") were taken from each day's "pour" as the concrete was being discharged from the plaintiff's mixer trucks, and thereafter tested for strength and other pertinent factors.

The six pours of June 23, July 1, July 5, July 7, July 12,

and July 14, 1961, after being tested as above, were found by the engineer not to meet the minimum contract specifications in various respects. Thereafter, extensive discussions, correspondence, and negotiations took place between all parties concerned, including Georgia Ports Committee, the plaintiff, the defendant, the engineer, and the testing laboratory, relating to the acceptability of the concrete and the responsibility for the payment of any replacement and corrective work which might ultimately be required by the engineer. During this time, additional tests of the concrete were made, both on the basis of the control cylinders and also on the basis of test "cores" taken from the questioned concrete for that purpose.

The final decision of the engineer was that the concrete was defective. It was accordingly "condemned as not in accordance with the terms of the Contract" in various specifically enumerated respects, and the defendant was directed to remove it and replace it with concrete meeting the specifications. The replacement concrete was furnished by the plaintiff under the terms of the original purchase order, and the project was ultimately completed. All concrete supplied by the defendant and accepted by the engineer was paid for by the defendant at the agreed price, less the defendant's expenses in removing and replacing the concrete condemned by the engineer.

Thereafter, in April, 1962—only nineteen days after the last concrete was supplied, and before payment was even due under the terms of the purchase order—the plaintiff commenced an action in the Court of Common Pleas for Beaufort County, South Carolina, against the defendant and four bonding companies who were sureties on the payment and performance bonds posted by the defendant, alleging that there was a balance of $87,513.09 due it for concrete supplied by it for the project. The action was removed by the defendants to the United States District Court for the Eastern District of South Carolina because of diversity of citizenship of the parties. Upon motion of

the defendants, the action was then transferred to the United States District Court for the Southern District of Georgia, Savannah Division, for the convenience of witnesses and in the interest of justice under Section 1404 (a), Title 28, U. S. C. A.

The defendants then moved to dismiss the Complaint on the ground that it was prematurely brought under the provisions of Section 23-1708 of the Code of Georgia. By his Amended Order dated August 5, 1961, United States District Judge Frank M. Scarlett dismissed the action as to the four bonding companies, allowed it to continue as to the present defendant, and granted the plaintiff leave to file an Amended Complaint.

The plaintiff thereafter filed an Amended Complaint again alleging that there was due and owing to the plaintiff by the present defendant the sum of $87,513.09 for concrete furnished to the defendant for the project in question.

The defendant duly filed an Answer alleging, in effect, that the concrete furnished by the plaintiff in the six pours mentioned above did not meet the contract requirements and had been condemned by the engineer; that the concrete involved in the six pours was in fact defective; that regardless of whether it was defective or not, under the terms of the contract documents the decision of the engineer that it was defective was final and binding upon the parties; that the defendant was accordingly entitled to offsets for the cost of the condemned concrete and the defendant's reasonable costs in removing and replacing it; that these offsets exceeded the amount of the plaintiff's claim; and that, therefore, there was no balance owed by the defendant to the plaintiff on the job. The Answer also alleged as a separate defense that because of defendant's specific agreement after the initial discovery of the defective concrete to abide by the decisions of the engineer and to bear the costs of removal and replacement of the concrete if the engineer should ultimately condemn it, and the defendant's acting in reliance thereon, the plaintiff was estopped to con-

tend that the defendant was not entitled to offset against the purchase price of the acceptable concrete delivered to the defendant the reasonable cost of removing and replacing the defective concrete.

By Motion dated October 16, 1963, and mailed the same day to the Clerk of Court and to plaintiff's counsel, defendant moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, on the ground that there was no genuine issue as to any material fact and that defendant was entitled to judgment as a matter of law.

The defendant's Motion was supported by a comprehensive affidavit, eight pages long, with some eighteen additional pages of exhibits, by Charles H. Girardeau, III, Vice-President of the defendant company and the officer and agent having general supervision of the project on behalf of the defendant (R. 68-92). The said affidavit was attached to the defendant's Motion and was served upon plaintiff's counsel with the Motion on October 16, 1963. The Motion was also supported by an affidavit of Harry C. Robert, Jr., the partner of Robert and Company, Associates, having general supervision of the project on behalf of the engineer (R. 93). The latter affidavit was mailed to the Clerk of Court and to plaintiff's counsel on October 18, 1963.

After correspondence between the Court and counsel during November, 1962, and January, 1963, as to a suitable date, the defendant's Motion was set for hearing before Judge Scarlett on Friday, February 7, 1964, at Brunswick, Georgia.

By the time of the hearing, the Motion had been pending almost four months. The case itself had been pending almost two years and had already been before Judge Scarlett on four occasions in connection with earlier proceedings.

Approximately three minutes before the hearing was scheduled to (and did) begin, counsel for the plaintiff undertook to serve on counsel for the defendant counter- affidavits by Harry C. Chambers (principal owner and operator of the plaintiff company), one Delmar L. Bloem, and

one Peter Doe. Counsel for the defendant declined to accept service of the counter-affidavits on the ground that they were out of time under Rule 56(c) of the Federal Rules of Civil Procedure.

When the hearing commenced a few moments later, the matter was called to the attention of the Court, and defendant's counsel objected to the admission and consideration of the counter-affidavits on the same ground as stated to plaintiff's counsel, i.e., that the affidavits were too late under Rule 56(c), F. R. C. P., and that the defendant had been denied an opportunity to consider or reply to them. Plaintiff's counsel did not offer any excuse or explanation for the belatedness of the counter-affidavits and made no motion for or request for a continuance or any other remedy under the Federal Rules of Civil Procedure. The Court stated clearly that he considered the counter-affidavits too late to be admitted under the Rules but directed plaintiff's counsel to hand them up to the Clerk for physical incorporation in the record, by way of an offer of proof. Oral argument on the Motion for Summary Judgment then commenced immediately, without any reservation of rights by defendant's counsel in any respect and without either the defendant's counsel or the Court having been given an opportunity to read or consider the contents of the counter-affidavits. During the course of the lengthy hearing, the plaintiff's counsel started out conscientiously enough, staying away from the contents of the affidavits—at least by way of specific reference—but gradually touched on their contents more and more, so that by the end of the hearing the Court must have been substantially familiar with their contents, whether properly so or not.

The plaintiff's counsel did not at any time prior to the hearing, during the hearing, or at its conclusion, offer any excuse or justification for his failure to follow the requirements of Rule 56 as to service of counter-affidavits, or request or move the Court that in the event the affidavits were not to be considered under plaintiff's offer of proof,

plaintiff be permitted an enlargement of time because of excusable neglect, or be granted a continuance, or be permitted to submit oral testimony of a witness who was present at the hearing.

After the hearing, and in order to reflect what had actually transpired in connection with the plaintiff's counter-affidavits, the Court wrote on the reverse side of the back in which the counter-affidavits were enclosed, a notation to the effect that the affidavits had not been served upon counsel for the defendant "till the case was determined by the Court" and that consequently under the Rules the affidavits were inadmissible (R. 126).

Thereafter, the District Court entered an Order holding that under the contract documents involved and the applicable State law the undeniable decision of the project engineer that the concrete in question was defective was binding on the parties and that, in addition, the plaintiff was estopped by its own specific agreement from questioning the engineer's decision. The Court concluded that there was no genuine issue as to any material fact involved, and accordingly granted the defendant's Motion for Summary Judgment in its favor on the plaintiff's alleged cause of action. (R. 126).

Plaintiff appealed from the Order of the District Court granting the defendant's Motion for Summary Judgment to the United States Court of Appeals for the Fifth Circuit, which by its decision dated October 5, 1965, affirmed the judgment of the District Court, and thereafter, by Order dated February 1, 1966, denied the plaintiff's petition for rehearing.

SUMMARY OF ARGUMENT

Perhaps understandably, the plaintiff-petitioner has artfully couched his Petition in the language of Rule 19 of the Rules of this Honorable Court, in the obvious hope of thereby persuading this Court that it should exercise its discretion and grant a review of the decision of the Court of Appeals.

On analysis, however, the arguments advanced by the plaintiff-petitioner are without merit.

The defendant submits that there are no "special and important" reasons in this case for granting a review on writ of certiorari. There is a complete want of any substantional federal question, indeed of any federal question. There is no conflict between the decision of the Circuit Court and any decision of another court of appeals on the same matter. No important state question is involved. The decision of the Circuit Court is not in conflict with applicable state law. No departure from the accepted and usual course of judicial proceedings is involved.

The plaintiff's principal complaint seems to be that the District Court's ruling that the counter-affidavits offered by the plaintiff three minutes before the hearing on the defendant's motion for summary judgment began were out of time under Rule 56 of the Federal Rules of Civil Procedure, in the absence of any excuse or explanation for this lateness or any motion or suggestion for some alternative procedure, constituted "a departure from the accepted and usual course of judicial proceedings".

This contention is plainly without merit. It is difficult to see how it can seriously be argued that the District Court's action in following and applying the Rule specifically applicable to the situation constituted a departure from the accepted and usual course of judicial proceedings. This is equivalent to saying that it is unusual to follow the Rules—which is ridiculous on its face.

The plaintiff's contention that it was "misled" by the manner or time of the District Court's ruling is equally without merit. In the first place, it is not supported by anything whatsoever in the record of the case, and, moreover, is contradicted by the plaintiff's own statement of the facts. The plaintiff states that when the defendant objected to admission of the counter-affidavits as too late under Rule 56, the Court "directed that they be handed to the Clerk as offer of proof". Any practicing attorney knows

that an "offer of proof" is not necessary when evidence has been admitted, but is made only when some particular evidence has been, or may be, excluded and the offering party wishes to exclude evidence physically incorporated into the record, to preserve it in case of a later appeal. The Court's action, as stated by the plaintiff itself, constituted a clear warning to the plaintiff that the Court had excluded or at the very least was quite likely to exclude, the counter-affidavits in question. It was clearly incumbent upon the plaintiff to take such action or make such request or motion as might be necessary to protect its position in the matter. Not having done so, the plaintiff cannot now excuse its own neglect by trying to blame it on the Court.

In essence, this is all that the plaintiff's complaint amounts to. Having obviously failed to follow the Rules in attempting to hand up the counter-affidavits at the commencement of the hearing, without excuse or explanation, even though the defendant's motion had been pending almost four months, and then failing to suggest or request any alternative procedure, the plaintiff now tries to blame the Court for the plaintiff's own derelictions.

The plaintiff obviously cannot shift the responsibility for the conduct of its case from its own shoulders to those of the Court in this fashion.

The truth of the matter is that the District Court did not depart from the accepted and usual course of judicial proceedings. It merely followed and applied the Rules. The Circuit Court of Appeals did not sanction any departure from customary procedure. It simply did not find any. It was the plaintiff itself who departed from the accepted and usual excuse of judicial procedure, first by failing to follow the Rules and then by failing to utilize the remedies available under the Rules.

The plaintiff's second complaint, that the District Court departed from the accepted and usual course of judicial proceedings a second time when it granted the defendant's motion for summary judgment even though it knew of the

existence of the plaintiff's counter-affidavits, and that the Circuit Court of Appeals sanctioned this departure, is not deserving of extended comment. The defendant has cited numerous cases—and could have cited hundreds more—in which motions for summary judgment were granted or other judicial rulings made, even though the court had excluded proffered evidence because of some failure by the offering party to follow the Rules. The plaintiff has cited only one—which differs from the present case in the most vital point involved. A court is not an investigative agency. It is a tribunal which applies the law to the facts presented to it by the parties under its rules. It has no duty or responsibility to seek out other evidence, even though it may be available. It has no duty or responsibility to disregard its own rules—particularly when the complaining party has itself clearly failed to follow them.

The plaintiff's third complaint, that the Circuit Court of Appeals erroneously applied the applicable law in affirming the District Court's grant of summary judgment to the defendant, is equally without merit. The parties here had agreed in the contract documents that the decision of the project engineer should be final and conclusive on all questions relating to performance of the constructive contract involved—not merely questions between the owner and the general contractor but *all questions* among all parties involved, whether owner, general contractor, sub contractor, materialman, or laborer. In addition, the plaintiff here had specifically agreed, after the question of acceptability of the concrete came up, that it would abide by the decision of the engineer, whatever that decision might be. It is undisputed and indisputable that the project engineer did in fact condemn some of the concrete supplied by the plaintiff and ordered it removed and replaced. The reasons given by the engineer all indicated that the cause of the defect was improper mixing and batching on the part of the plaintiff.

Under the applicable law the decision of the engineer was

final and binding on the parties, unless based on fraud, bad faith, or such gross mistake as would necessarily imply bad faith or a faliure to exercise an honest judgment. On the basis of the facts before it, the District Court very properly concluded that there was no genuine issue as to any material fact and that the defendant was entitled to judgment as a matter of law. After a careful and thorough review of the case, the Circuit Court of Appeals agreed.

The defendant respectfully submits that both the District Court and the Circuit Court of Appeals were correct, and that the only error involved in the case is the plaintiff's own failure to follow the Rules.

The case before this Court, in a nutshell, is as follows: Some of the concrete supplied by the plaintiff failed to meet the contract specifications and was condemned by the project engineer. The plaintiff welched on its agreement to abide by the engineer's decision and sued the defendant. The defendant set up the undisputed facts and history of the controversy as a defense. The plaintiff ignored the rules of the Court, offered no excuse or explanation for doing so, and failed to avail itself of any of the remedies which the Court, in its discretion, on a proper showing, might have granted. The Court quite properly found that there was no genuine issue before it as to any material fact and ruled in the defendant's favor. The Court of Appeals agreed and affirmed. The plaintiff is now trying to find an excuse for his own failure to follow the Rules by blaming it all on the Courts below.

The defendant respectfully submits that neither the District Court nor the Circuit Court of Appeals has committed any error or committed or sanctioned any departure from the customary standards of judicial proceedings, and that the writ of certiorari sought by the plaintiff in this case should be denied.

ARGUMENT

I. *The action of the District Court in connection with the exclusion of the plaintiff's counter-affidavits did not constitute a departure from accepted and usual standards of judicial proceedings.*

(Question 1)

When the plaintiff's argument concerning the action of the District Court in excluding the plaintiff's counter-affidavits is properly considered in the light of the specific requirements of the Federal Rules of Civil Procedure and the customary and accepted functions and duties of the Courts and of attorneys, it is at once apparent that the plaintiff's argument is replete with inconsistencies and unfounded charges. *In essence, the plaintiff's argument on this issue amounts to no more than an unjustified attempt to blame the United States District Court and the United States Court of Appeals for the Fifth Circuit for the plaintiff's own derelictions.*

The fallacy of plaintiff's position is readily observed from the plaintiff's own statement of the first question purportedly presented for review by its Petition for Certiorari (page 2 of the Petition). It is apparent that this question, as stated by the plaintiff, is inconsistent within itself. Plaintiff there states that plaintiff's counsel was *led* to believe that the counter-affidavits were being considered by the Court, and that plaintiff's counsel was *caused* not to offer any excuse for the untimely service thereof; not to request a continuance; and not to offer further available testimony; all as a result of certain alleged conduct of the Court. It is clear, however, that the stated conduct upon which the plaintiff relies does not in any way support the conclusion that plaintiff was *misled* in any manner or *caused* to pursue its course of inaction. On the contrary, the Court's action, as stated by the plaintiff, was such that the plaintiff was clearly warned to take some action to insure consideration of the counter-affidavits on the Motion

for Summary Judgment if it desired to protect its position despite the untimely service.

In the first place, the plaintiff itself concedes that the Court directed the counter-affidavits to be handed to the Clerk as an "offer of proof" (page 2 of the Petition). It goes without saying that no offer of proof is required for admissible evidence. Any practicing attorney knows that an "offer of proof" is made only when some particular evidence has been, or may be, excluded, either tentatively or finally, and the offering party wishes the excluded evidence incorporated into the record to preserve it in case of a later appeal. No clearer indication could be made to the plaintiff's attorney that the Court regarded the counter-affidavits as inadmissible. No clearer notice could be given to the plaintiff's attorney of the probability of the Court's ultimate decision that the counter-affidavits should be excluded from consideration. To conclude that the plaintiff was misled by such action or caused thereby to believe that its counter-affidavits were considered as properly in evidence and before the Court is plainly absurd.

The inference of acceptability of the counter-affidavits which the plaintiff seeks to derive from the circumstances that plaintiff's counsel fudged on the Court's ruling and argued matters contained in the counter-affidavits during the course of the hearing is equally unwarranted. It must be remembered that the counter-affidavits were tendered only moments before the hearing actually began. The counter-affidavits were some twelve typed legal size pages in length, with some twelve pages of exhibits. The Court did not have any opportunity even to read the counter-affidavits, much less to become fully familiar with their contents prior to the commencement of the plaintiff's argument, and the pleadings and the defendant's motion and supporting affidavits already in the record of the case were lengthy and detailed. *The Court obviously could not be expected to know during the course of the hearing on what particular source the plaintiff was basing his argument on each par-*

ticular point. Furthermore, even if the Court had been fully aware during the course of the oral argument that the plaintiff's counsel was referring to matters contained in the counter-affidavits, such oral argument followed the clear notice of the inadmissibility of the counter-affidavits afforded by the offer of proof, and the Court's polite indulgence of such argument without reprimand does not preclude the Court from thereafter rendering the very decision as to which the plaintiff's counsel was fully forewarned.

Plaintiff's counsel appears simply to have assumed on his own appraisal of the matter that the Court would ultimately allow the counter-affidavits to be considered despite their untimely service and despite the absence of any excuse for such untimely service. *Clearly, the plaintiff's counsel was not entitled to make such an assumption.* Rule 56(c) of the Federal Rules of Civil Procedure is clear and specific in requiring that counter-affidavits be served "prior to the day of the hearing". Such requirements must clearly be followed if no excuse for non-compliance is offered. *Surkin v. Charteris,* 197 F. 2d 77 (5th Circuit, 1952). *Yet the plaintiff offered no such excuse, and never has.*

All the counter-affidavits had been prepared well in advance of the hearing and could easily have been provided to the defendant *at least* the day before the hearing so that defendant's counsel could have had an opportunity to consider them before argument. In fact, one of the counter-affidavits (that of Peter Doe) was dated October 16, *1961,* and must have been in the plaintiff's file more than *two years* at the time of the hearing. Under the circumstances, it is plain that no attorney could reasonably expect any other result than that the Court would follow the specific requirements of the Rule unless a strong showing were made to excuse the untimely service. The ultimate effect of the plaintiff's position is consequently an assertion that the District Court was guilty of departing from the accepted and usual course of judicial proceedings *because it followed the specific requirements of the Federal Rules of*

Civil Procedure when it was offered no other alternative, and that the Circuit Court is guilty of sanctioning such procedure. Such a proposition is, of course, preposterous on its face.

The plaintiff contends that the actions of the District Judge in regard to the question of the admissibility of the counter-affidavits offered by the plaintiff constitute "a departure from the accepted and usual course of judicial proceedings." *The defendant submits, however, that this simply is not so. (Questions of this sort are commonly and frequently taken under advisement by the trial judges of the courts of this land when first presented, to be formally resolved and decided later, and in such cases it is incumbent upon the attorneys concerned to take such action as may be necessary or desirable to preserve and protect their client's position in the matter. If the attorney does not do so, and the Court ultimately rules against him, he cannot excuse his own neglect by trying to blame it on the Court.*

In any event, in the present case the District Court made its views on the question amply clear at the very outset, and the plaintiff has no ground for complaint that the District Court adhered to its original position holding the counter-affidavits inadmissible. The plaintiff is hoist upon his own petard, not the District Court's.

This Court has declared in its Revised Rules that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are "special and important" reasons therefor (Rule 19, Revised Rules of the Supreme Court of the United States). We submit that there are no such "special and important" reasons presented in this case. While the plaintiff has attempted to phrase his Petition in the language of Rule 19(b), relating to departures from accepted and usual standards of judicial proceedings, *it is clear that there is no such departure in fact involved in the Court's action in this case. It was the responsibility of plaintiff's attorney to follow the Rules or himself present to the Court some excuse*

or procedure to protect his position, and plaintiff cannot charge the Court with this responsibility. The plaintiff is seeking merely to overturn an adverse ruling for which it alone is to blame. While the plaintiff is understandably disappointed in the outcome of its action, it is, of course, settled that this Court does not sit merely for the benefit of the particular litigants. *Rice v. Sioux City Cemetery*, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955); *Magnum Import Co. v. Coty*, 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922 (1923).

It is also noted that the plaintiff claims in connection with its argument relating to the District Court's action in excluding the plaintiff's counter-affidavits that if plaintiff's counsel had known that the Court would not admit or consider the counter-affidavits (although there is no reason why he should not have known), plaintiff's counsel could have asked for an enlargement of time and made a showing that the failure to act was the result of excusable neglect under Rule 6(b); or could have requested a continuance or extension of time under Rule 56(f); or could have submitted oral testimony of a witness at the hearing under Rule 56(e). It is, of course, obvious that what the plaintiff's counsel now suggests on hindsight he *could* have done is no indication of what he *would* have done, even if we were to assume that he had determined to pursue some procedure in an attempt to remedy his default. All that is known, *and all that the record before this Court shows*, is that *nothing was* done, so that this Court has no standard by which to measure any alleged prejudice.

Furthermore, the plaintiff advances its argument in this respect as though it would have been *entitled* as a matter of course to one or more of the reliefs which it now suggests. Clearly, the plaintiff had no *right* to any of the remedies to which it refers. *All the suggested procedures are permissive only and may be granted or refused within the sound discretion of the Court.*

Certainly, plaintiff had no absolute right under Rule

56(e) to put a witness on the stand and take testimony in lieu of the affidavits contemplated by Rule 56. A hearing on a Motion for Summary Judgment is not intended or expected to be a trial. The requirement of Rule 56(c) that opposing affidavits be served "prior to the day of the hearing" is obviously intended to provide notice to the moving party in advance of the hearing so that adequate preparation can be made. It is a requirement of simple fairness. The unexpected presentation of a witness for oral testimony at the hearing on the Motion would plainly have the same effect of surprise and lack of opportunity for preparation as the presentation of the same evidence in affidavit form for the first time at the hearing—which is specifically prohibited by Rule 56(c). *Moreover, Rule 56(e), upon which plaintiff relies for the suggested procedure of taking oral testimony at the hearing does not provide for the taking of such testimony.* Rule 56(e) permits the consideration of "depositions" (assuming they are requested by counsel). The regular procedure for the taking of depositions, of course, provides the notice and opportunity for preparation consistent with Rule 56(c). Although the Court undoubtedly has the power in a proper case and under proper circumstances to receive oral testimony on a Motion for Summary Judgment, it is clearly not the intent of the Rules that this power should be exercised to promote surprise or to encourage laxity in complying with specific requirements of the Rules.

Rule 56(f), upon which plaintiff relies for its suggested procedure of a continuance, it totally inapplicable to the present case. That section of the Rule provides only for a situation in which the party makes a showing that affidavits are not available. *In the present case, the affidavits in question show on their face to have been available well in advance of the hearing but were simply not supplied in accordance with the Rules.*

Moreover, the date for the hearing on the defendant's motion for summary judgment had been set well in advance,

after discussion going back almost four months, and it is highly unlikely that the Court would have granted a continuance even if one had been requested.

It is also clear that the plaintiff's suggested procedure of requesting an enlargement of time upon a showing of excusable neglect under Rule 6(b) is entirely inappropriate for present consideration. *Relief under Rule 6(b) is, of course, also discretionary with the Court and not a matter of right.* Furthermore, numerous cases make it plain that under that Rule, the party seeking to be relieved from his failure to observe the time limit prescribed by some other Rule has a burden to offer some justifiable explanation to excuse his neglect and that until and unless he does, the Court is not vested with any discretion to exercise one way or the other. See, e.g., *Driver v. Gindy Manufacturing Corporation*, 24 F. R. D. 473 (E. D. Pa., 1959); *Jim's Trailer Sales v. Shutok*, 153 F. Supp. 274 (W. D. Pa., 1957); *Arnold v. Chicago, B. & Q. R. Co.*, 7 F. R. D. 678 (D. C. D. Neb., 1947); *United States v. One Ford Coupe*, 26 F. Supp. 598 (D. C. M. D. Pa., 1939).

If the plaintiff had any excuse for its failure to follow the Rule, it has certainly had ample opportunity to supply it by now. *Yet it has never to date offered any excuse whatsoever.* Even with full review of the matter before the Court of Appeals for the Fifth Circuit, the plaintiff offered no excuse. This was recognized and commented upon by the Court of Appeals in its Opinion affirming the Order for Summary Judgment (Petition, page 15). *It is, therefore, clear that this Court has before it nothing in the record to indicate that the plaintiff would have been entitled to the relief of which it claims to have been deprived.* Clearly, the burden is on the plaintiff to bring before this Court some record to support its claim that both the District Court and the Court of Appeals has committed error. *It is equally clear that the plaintiff has failed to do so.*

In fact, all the facts before this Court clearly indicate that no error has been committed and that plaintiff would

not have been entitled to the relief of which it now claims to have been deprived. Under these circumstances, the questions presented to this Court for review regarding the proceedings in the Courts below in connection with the exclusion of the counter-affidavits, are purely academic. We refer again to this Court's opinion in *Rice v. Sioux City Cemetery*, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955), where it was pointed out with reference to the "special and important" reasons mentioned in Rule 19 of the Revised Rules of the United States Supreme Court (99 L. Ed. 891, 900):

> "Special and important reasons imply a reach to a problem beyond the academic or episodic . . . ."

It is obvious that no such "special and important reasons" are presented by the plaintiff's petition here.

II. *The District Court was not required to refrain from granting Summary Judgment for the Defendant on the basis of the pleadings and the Defendant's supporting affidavits merely because Plaintiff had unsuccessfully attempted to serve counter-affidavits that were out of time under the Rules, and the District Court's action in granting Summary Judgment under these circumstances was not a departure from the accepted and usual course of judicial proceedings.*

(Question 2)

The plaintiff's argument in connection with the second of the questions which it states is presented for review is based upon two patently incorrect contentions. It is claimed by the plaintiff that the District Court departed from the accepted and usual standards of judicial proceedings because it granted summary judgment when the defendant's own affidavits showed genuine issues of fact and when the Court had before it counter-affidavits which raised issues of fact. It is apparent, however, that no genuine issues of fact within the meaning of Rule 56 are raised

either in the defendant's own affidavits or the plaintiff's counter-affidavits.

The references made by the plaintiff in its Petition to the record indicate that the plaintiff's contention that "the defendant's affidavits, even considered alone, showed genuine issues of fact existed," is apparently based on two letters which were attached to the affidavit of Charles H. Girardeau, III, Vice-President of the defendant corporation and the officer and agent having general supervision of the project concerned on behalf of the defendant. The two letters were written by Mr. Girardeau during the course of the negotiations between the parties as to the acceptability of the concrete in question and contain statements to the effect that in some respects the concrete did meet the engineer's specifications.

Considering these letters out of context and without reference to the affidavit to which they are attached as exhibits, it is, of course, possible to argue that they show that the defendant believed the concrete was not defective. It is obvious, however, that the letters referred to cannot be isolated and considered alone without reference to the affidavit of which they are a part. That affidavit itself fully explains the meaning and effect of the letters so that there is no justification for any argument or contention that any genuine and material issue of fact is raised thereby.

The affidavit of Mr. Girardeau relates in full detail the reason for the letters and the circumstances under which they were written (R. 74-76). The affidavit states that after being notified by the engineer of the defective condition of the concrete, the defendant, for the benefit of the plaintiff, and in order that the position of the plaintiff not be foreclosed, agreed with the plaintiff that it would cooperate with the plaintiff and pursue the contentions of the plaintiff that the concrete was acceptable, so long as it might reasonably do so, to the point that it would not be in breach of its contract with the owner, *provided plaintiff agreed (1) that it would abide by the ultimate decision of*

the engineer, whatever said decision might be, and (2) that in the event it was necessary to remove and replace said concrete, all costs of such corrective work would be for the account of and borne by the plaintiff. The affidavit further states that in order to induce the defendant to assist it in further negotiations with the engineer, as aforesaid, the plaintiff specifically promised and agreed that it would abide by the decision of the engineer, whatever said decision might be, and that in the event said decision required removal and replacement of said defective concrete, all costs of such corrective work would be for the account of and borne by the plaintiff. The affidavit includes a number of other letters corroborating the agreement referred to, defendant's good faith effort to comply with it, the engineer's final decision that the concrete was defective and had to be removed, and the ways in which it failed to meet the specifications. (R. 87 (actually printed at R. 51), R. 87 (printed at R. 56), R. 89 (59), R. 89 (63), R. 89, R. 90 (63), R. 90 (66)).

In the face of contents of the entire affidavit, the other enclosures thereto, and the defendant's other documented evidence, *it is specious and frivolous—and beneath the dignity of this Court—to contend that the defendant's own affidavits raise a genuine issue as to any material fact.*

Moreover, plaintiff overlooks the fact that under the contract documents and the applicable law *it makes absolutely no difference what the defendant's opinion was with respect to the matter.* Under the contract documents the parties had agreed that the decision of the engineer should be final and binding upon the parties on all questions relating to the performance of the work and the interpretation of the specifications. In addition, as the defendant's affidavits plainly show, the plaintiff specifically agreed to abide by the decision of the engineer. It is undisputed (and indisputable) that the engineer did in fact condemn the concrete and ordered its removal and replacement. Under the terms of the contract documents and the agreement

described in the affidavit of Mr. Giarardeau, the plaintiff was bound by the engineer's decision to bear the costs of removal and replacement of the concrete regardless of whether the defendant agreed with the engineer's decision or not.

The plaintiff's contention that issues of fact were raised by the plaintiff's counter-affidavits is equally without merit. Under the well-settled law of Georgia (and of virtually all of the States of the United States), where parties to a construction contract designate a person who is authorized to determine questions relating to the performance of the contract, and agree that his decision shall be final, the parties are bound by his determination of those matters which he is authorized to determine, except in cases of fraud, bad faith, or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment. *State Highway Dept. v. McDougald Construction Co.*, 189 Ga. 490, 6 S. E. 2d 570 (1939); *Royal Indemnity Co. v. Batson-Cook Co.*, 37 Ga. App. 797, 142 S. E. 210 (1928); *Green & Co. v. Jackson & Co.*, 66 Ga. 250 (1880); *Grant, Alexander & Co. v. Savannah, Griffin & North Alabama Railroad Co.*, 51 Ga. 348 (1874). It is undisputed (and indisputable) that the plaintiff and the defendant specifically agreed under the terms and conditions of the purchase order-subcontract which incorporated the terms and conditions of the plans and specifications, including general condition, that the decision of the engineer, as to all questions of compliance with the contract documents was final and binding on the parties (R. 49, 50 and 69). It is equally undisputed (and indisputable) that the engineer did in fact condemn the concrete in question and order it removed and replaced. (R. 51, 56, 73 and 93).

It is, therefore, apparent that the only issue in a case of this nature is whether the decision of the engineer, in condemning the concrete as not in accordance with the plans and specifications, was based on fraud, or bad faith, or such gross mistake as would necessarily imply bad faith, or a

failure to exercise an honest judgment. It is not whether the engineer was right or wrong, but whether he was so wrong that his mistake could only have been the result of fraud, or bad faith, or such gross mistake as necessarily to imply bad faith or a failure to exercise an honest judgment. The latter, of course, amounts to fraud.

The engineer in this case, Robert and Company, Associates, of Atlanta, Georgia, is one of the outstanding and best-known architectural and engineering firms in the United States. Apparently in recognition of this fact, the plaintiff has never dared to contend that the engineer's decision was based upon fraud, or bad faith, or such gross mistake as necessarily to imply bad faith. Instead, after apparently familiarizing itself with the language of the Court's decision in *State Highway Department v. McDougald Construction Co.*, 189 Ga. 490, 6 S. E. 2d 570 (1939), the plaintiff has contented itself with obtaining an affidavit from its principal officer and owner and one from a paid professional witness (whose views were known to the project engineer at the time of his decision) stating, in effect, that in *their* opinion the engineer's decision was wrong.

The plaintiff's affidavits, however, contain no *facts* justifying any such conclusion and give no reasons providing a reasonable or plausible basis as to why a reputable engineer selected by the owner, with nothing to gain one way or the other, should have failed to exercise an honest judgment. Indeed, it is clear beyond a peradventure from the indisputable history of the tests and negotiations as to the acceptability of the concrete in question that the engineer did in fact exercise an honest judgment.

All that the plaintiff and its affidavits are really saying is that they do *not agree* with the engineer's decision. Under the terms of the contract documents and the applicable law, however, this is irrelevant and does not create a genuine issue as to any material fact.

In *Bruce Construction Corp. v. United States, for use of*

Westinghouse Electric Supply Co., 242 F. 2d 873 (5th Circuit, 1957) the Court, speaking of the showing required to be made by the adversary on a Motion for Summary Judgment, pointed out (242 F. 2d 873, 874):

> "But equally vigorous in giving full range to this mechanism, we have just as consistently rejected any notions that pretense, or apparent formal controversy can thwart application of this rule (Rule 56) or hamstring the court in determining whether it is a proper case for it. Consequently, when a movant makes out a convincing showing that genuine issues of fact are lacking, we require that the adversary adequately demonstrate by receivable facts that a real, not formal, controversy exists, and, of course, he does not do that by mere denial or holding back evidence."

Similarly, in *Bros., Incorporated v. Grace Mfg. Co., et al.*, 261 F. 2d 428 (5th Circuit, 1958), the Court said (261 F. 2d 428, 433):

> "But, if, on the other hand, there is, by a presentation of factual evidentiary details having the substantial characteristics of receivable evidence as compared with conclusions, a convincing showing that no real genuine controversy on the decisive fact exists, a more formal denial is but a pretended one, and is insufficient."

The principles set forth in the foregoing decisions and in numerous other similar decisions throughout the United States have been embodied verbally in Rule 56 by the recent amendment to Rule 56(e) which added to that section the following sentence:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The defendant earnestly submits that the plaintiff's counter-affidavits raise no genuine issue of fact. Regardless of whether they do or do not, however, it is plainly of no consequence in any event what was contained in the counter-affidavits for the simple reason that *the counter-affidavits were not served in time under the Rules and were not before the Court for consideration.*

The plaintiff's Petition apparently takes the position that the District Court was required, in order to comply with accepted and usual standards of judicial proceedings, to refrain from granting summary judgment for the sole reason that the Court was aware of unacceptable affidavits. This contention is entirely without merit. Accepted and usual standards of judicial proceedings clearly do not require that the Court consider that which is excluded from consideration under the Federal Rules of Civil Procedure. *This amounts to saying that it is contrary to accepted and usual course of judicial proceedings for the Court to apply and abide by the Rules. This is plainly absurd.*

On the contrary, the law is clear that the Court must act on a Motion for Summary Judgment on the basis of what is properly before it, and there is no duty imposed on the Court to consider untimely affidavits merely because it is aware of their existence. For example, in *Surkin v. Charteris*, 197 F. 2d 77 (5th Circuit, 1952), the defendant moved for summary judgment in a negligence action and supported his motion by affidavits setting forth facts establishing an absence of negligence on the part of the defendant. The plaintiffs did not file opposing affidavits prior to the hearing as required by Rule 56(c) and the District Court entered summary judgment for the defendant. Two days after the hearing, the plaintiff's moved the District Court for leave to serve opposing affidavits, but the motion was denied. Affirming the judgment, the Court of Appeals said (197 F. 2d 77, 79):

> "Nor do we agree with the appellant's contention that the trial court abused its discretion in denying

their motion for leave to serve opposing affidavits two days after oral argument on the motion was heard. Rule 56 provides that the motion shall be served at least ten days before the time fixed for the hearing and that the opposing party, *prior to the day of hearing*, may serve opposing affidavits. Here, the motion for summary judgment was filed on December 20, 1950, and on December 22nd, the plaintiffs were notified that a hearing on the motion would be had on January 16, 1951. Thus, it is obvious that the plaintiffs had far more than the requisite notice. Rule 56 also provides that should it appear from the affidavits of the party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition thereto the trial court may afford him relief. In the instant case, the appellants purposely refrained from offering opposing affidavits and no excuse whatsoever was offered for not filing such affidavits prior to the hearing as required by Rule 56. Under the circumstances of this case, we agree with the appellees that the trial judge did not abuse his discretion. Cf Columbia Fire Ins. Co. vs. Boykin & Taylor, 4 Cir., 185 F. 2d 771.' (Emphasis added)."

In *Sieb's Hatcheries v. Lindley*, 13 F. R. D. 113 (D. C. W. D. Ark., 1952), the Court was presented with a situation identical in effect with the situation before the Court in the present case. In that case, the defendant filed an unverified answer and thereafter filed an unsworn response to a request for admission of facts served by the plaintiff. The plaintiff moved for summary judgment. After the expiration of time allowed for filing the response to the request for admission, the defendants moved to amend their unverified response by adding certain factual matters and by verification of all the facts contained in the response. The Court, however, refused to permit the requested amendment and required the motion for summary judgment to be heard with the plaintiff's request for admission of facts admitted by de-

fendants as true because of the lack of a sworn response. The Court thus enforced the time limitations provided by the Rules despite the Court's awareness of the existence of facts not timely presented. The Court pointed out (13 F. R. D. 113, 118):

> "No request was made by the defendants for an enlargement within the time prescribed by Rule 36. The first notice that anyone had that the defendants desired to file a response in compliance with the rule was on August 14, 1952, when they filed a motion to amend the unsworn response. It must be borne in mind that this motion was filed after receipt by the defendants of the brief of plaintiff in support of its motion for summary judgment. *Thus the motion or request now before the court was made after the expiration of the specified period permitting the filing of the response, and can only be granted by the Court if the failure to file a proper response was the result of 'excusable neglect'.*"
>
> "* * *
>
> "*The Court is not unmindful of the possible effect of the action of the defendants in failing to properly respond to the request for admission of facts. However, the Court is convinced that the neglect to comply with the rule is not excusable neglect.* 'Excusable neglect' is ordinarily understood to have been the act of a reasonably prudent person under the same circumstances. It can hardly be argued that the failure to file a sworn response was that of an ordinarily prudent person, especially when it is remembered that at the pre-trial conference on July 28, 1952, when the Court requested the parties to submit briefs on the questions involved in the motion for summary judgment, that defendants made no request for permission to file a sworn response and to substitute another entirely different from the original unsworn one, and did not take any action thereon until after the brief of the plaintiff in support of the motion for summary judgment was served."

See also the following cases, out of the hundreds that could be cited:

Maghan v. Young (C.A.D.C. 1946) 154 F. 2d 13.

Driver v. Gindy Manufacturing Corporation (E.D. Pa. 1959) 24 F.R.D. 473.

Jim's Trailer Sales v. Shutok (W.D. Pa. 1957) 153 F. Supp. 274.

Canning v. Star Publishing Company (D.C. Del. 1956) 19 F.R.D. 281.

Hornsby v. Tennessee Valley Authority (E.D. Tenn. 1950) 10 F.R.D. 457.

Arnold v. Chicago, B. & Q. R. Co. (D.C. Neb. 1947) 7 F.R.D. 678.

Ledwith v. Storkan (D.C. Neb. 1942) 2 F.R.D. 539.

United States v. One Ford Coupe (D.C.M.D. Pa. 1939) 26 F. Supp. 598.

Defendant submits that the District Court in the present case was eminently correct in enforcing the time limitations of Rule 56(c). In the present case, the District Court was not concerned with evidence *known to exist by both parties prior to the hearing* subject to a mere formal defect in the qualification of such evidence for purposes of proof as was present in the cast of *Whitaker v. Coleman*, 115 F. 2d 304 (5th Circuit, 1940), cited by the plaintiff. The District Court in the present case was concerned with the propriety of permitting surprise evidence to be thrust upon the Court and upon counsel for the defendant in complete violation of the specific requirements of the Rules. *We cannot conceive that the Court's refusal to permit such procedure should be considered a departure from accepted and usual standards of judicial proceedings.* On the contrary, defendant submits that to require the Court to refrain from acting in accordance with the Rules or to assume control of the plaintiff's case by itself initiating unrequested procedures would be an innovation in judicial proceedings not heretofore known and would encourage a laxity in compliance with the Rules well below the established standards of Federal practice.

III. *The Court of Appeals for the Fifth Circuit was correct in sustaining the finding of the District Court that the decision of the engineer was binding and that the defendant was entitled to Summary Judgment.*

(Question 3)

A. *The Court of Appeals correctly held the plaintiff bound by the decision of the engineer.*

In the portion of its Petition dealing with this question the plaintiff is apparently attempting to persuade this Court to review this case for the alleged reason that the Court of Appeals misapplied the law of Georgia. Plaintiff's argument in this respect is based entirely upon a misapprehension of indisputable facts and of the clearly stated rights and obligations of the parties under their contract, and is clearly without merit.

Plaintiff attempts to escape the binding effect of the engineer's decision required under the principles set forth in *State Highway Dept. v. McDougald Construction Company*, 189 Ga. 490, 6 S. E. 2d 570 (1939), and the numerous other decisions in accord therewith, by asserting plaintiff's status as a *materialman. Plaintiff overlooks the indisputable fact, however, that the plaintiff, as a materialman, specifically agreed with the defendant under the terms of the purchase order-subcontract that the decision of the engineer as to all questions of compliance with the contract documents was final and binding on the parties, including the plaintiff, as a materialman or sub-contractor.*

Paragraph 2 of the conditions stated in the purchase order provides in part:

> "2. This order is subject to the approval of the Architect. The architect's decision as to the true construction and meaning of the drawings and specifications shall be final." (R. 50).

Paragraph 3 of the conditions contained in the purchase order further provides:

> "3. You understand and agree that you are to com-

ply with and be governed by all provisions of the plans and specifications, *including general conditions*, liquidated damages, etc." (Emphasis added.) (R. 50).

Pertinent provisions of the general conditions contained in the construction contract between the defendant and the Georgia Ports Committee provides:

"1.03—*Status and Decisions of Engineer*: The engineer shall have general supervision and direction of the work. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the contract.

"*The Engineer shall make decisions on all claims of the Contractor and on all other matters relating to the execution and progress of the work or the interpretation of the Contract Documents.*

"*The decisions of the Engineer shall, within the terms of the Contract Documents, be final.*" Emphasis added).

"1.37—*Removal of Materials and Correction of Work*: All materials of unsound or otherwise unfit character and all workmanship not in accordance with the terms of the Contract will be condemned by the Engineer.

"The Contractor shall promptly remove from the premises all condemned materials, whether incorporated in the work or not, and the Contractor shall promptly replace and reexecute the work to the satisfaction of the Engineer, and without expense to the Owner, and shall bear the expense of making good all work of other Contractors which is destroyed or damaged by such removal and replacement." (R. 69-70).

The defendant having itself agreed to be bound by the decision of the Engineer under the terms of the aforementioned documents, it is clear that the principles set forth in *State Highway Dept. v. McDougald Construction Co.*, 189 Ga. 490, 6 S. E. 2d 570 (1939) and the other Georgia decisions in accord therewith are as fully applicable to the de-

fendant as to the principal contractor.

The defendant's argument that the general rule set forth in the Georgia decisions is not applicable to the present case for the alleged reason that the engineer's decision related only to the defectiveness of the completed work and did not touch upon responsibility for such defectiveness as between the principal contractor and the plaintiff is simply not in accord with the facts. The test procedures utilized in this case in accordance with the contract documents completely negate any argument that responsibility for the defective condition of the concrete can be placed on the defendant rather than the plaintiff. *In order to prevent the very contention which the defendant now makes, the test samples were taken from the concrete supplied by the plaintiff as it was being discharged from the plaintiff's trucks and before the defendant had anything whatsoever to do with it.* It was the results of those tests of the control cylinders that caused the engineer to bring the defective condition of the concrete to the attention of the parties in the first place. Subsequent tests made after taking cores from the emplaced concrete merely served to confirm the original findings that the concrete was defective *as supplied* by the plaintiff.

Moreover, the defects specifically enumerated by the engineer all relate to the inadequate cement content of the concrete and to the plaintiff's apparent failure to mix it properly (R. 52-53). *Not one of the specific defects enumerated by the engineer relates to the manner of placing, finishing or curing of the concrete.* In addition, the engineer specifically described the defects as being due to "inadequate mixing" and "deficiency in the batching" of the cement. (R. 57).

It is thus apparent that the engineer condemned the concrete as not being in accordance with the specifications *as supplied by the plaintiff.* That the question of whether concrete supplied by the plaintiff met the contract specifications was within the agreed authority of the engineer to

decide as a matter involving "the true construction and meaning of the specifications" and "the interpretation of the Contract Documents" is obvious. The Court was, therefore, entirely correct in holding the plaintiff bound by the engineer's decision under the law of Georgia as established by the foregoing authorities.

Furthermore, it is plain that the Court could not in any event have reasonably reached any other result than that the plaintiff was bound by the decision of the engineer and required to bear the cost of removing and replacing the condemned concrete. As mentioned hereinabove, the affidavits of the defendant showed by documented facts, which could not be refuted by simple denial, that after the defects had been discovered and while negotiations were being conducted in connection therewith, the plaintiff specifically agreed, independent of the terms of the purchase order, to be bound by the decision of the engineer. Under that agreement, which was shown to have been fully complied with by defendant, the plaintiff promised and agreed that if the final decision of the engineer required removal and replacement of the concrete, all costs of such corrective work would be for the account of and borne by the plaintiff (R. 74-76). Defendant, therefore, respectfully submits that under any view which may be taken of the case, the plaintiff was required to abide by the decision of the engineer and that the Court was correct in entering summary judgment for the defendant.

B. *The Court of Appeals Correctly affirmed the Order for Summary Judgment even without regard to the effect of the decision of the engineer.*

A review of the decision of the Court of Appeals for the Fifth Circuit in this case plainly reveals that that Court did not limit its affirmance of the District Court's Order for summary judgment to the sole ground that the plaintiff was bound by the decision of the engineer. On the contrary, after first holding that the District Court did not abuse its discretion in excluding the plaintiff's counter-affidavits,

the Court of Appeals went on to hold (Petition, page 15), without reference to the engineer's decision, that without the excluded affidavits the bare allegation in the plaintiff's complaint that the plaintiff furnished adequate concrete could not withstand the force of the affidavits and letters submitted by the defendant in support of its Motion for Summary Judgment. (The Court of Appeals then went on to hold that "moreover", under Georgia law, the decision of the engineer was conclusive).

Considering the wording of Rule 56(e), which is quoted in the opinion of the Court of Appeals and cited hereinabove, and the established case law in accord therewith, this independent and separate holding of the Court of Appeals as to the plaintiff's failure to meet the requirements of this Rule, is, of course, entirely correct. *No ground for review by this Court of this independent holding of the Court of Appeals is presented or claimed by plaintiff in its Petition for Certiorari.*

It is thus apparent that even if the Court of Appeals were completely wrong in its application of the engineer's decision in this case, affirmance of the Order of summary judgment is nevertheless required. Clearly, no reason exists for this Court to review the decision of the Court of Appeals for the Fifth Circuit for the purpose of considering a question which will have no effect on the ultimate result of the case because of the existence of independent grounds for affirmance not challenged in this Court. This Court does not exist for the purpose of deciding academic questions.

CONCLUSION

In conclusion, respondent respectfully submits that none of the "special and important" reasons required by Rule 19 for an exercise of this Court's discretion to grant a writ of certiorari to review a decision of a Court of Appeals are present in this case.

While the petitioner has charged the United States Court of Appeals for the Fifth Circuit, in the language of Rule 19, with sanctioning a departure from the accepted and usual standards of judicial proceedings, no such departure has

been shown in fact to have occurred. This case involves no more than a ruling that parties engaged in litigation in the Federal courts must follow the Federal Rules of Civil Procedure. The petitioner's claim that the District Court departed from accepted and usual standards of judicial proceedings and that the Court of Appeals sanctioned such departure is no more than an effort to find an excuse for the petitioner's own failure to follow the Rules and to seek a reversal of an adverse, but correct, decision. The petitioner's failure to succeed in his action when confronted with a meritorious defense cannot be charged to the Court.

The respondent submits that the decision of the United States Court of Appeals for the Fifth Circuit which the petitioner requests this Court to review not only is in full accord with the Federal Rules of Civil Procedure, but also is in full accord with the established law of Georgia as applied to the indisputable facts in this case.

Respondent further submits that this Court should not be asked to review matters which have been fully litigated in the Courts below relating to private obligations under a construction sub-contract and which are not affected by any matters of grave and public concern, particularly when such matters are of purely academic interest.

We respectfully submit that the Petition herein presents no questions which should be reviewed by this Court and that the writ of certiorari sought by the petitioner should be denied.

Respectfully submitted,

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